

In the United States Court of Appeals
for the Ninth Circuit

PAUL LUSTIG, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

HALINA LUSTIG, RESPONDENT

On Petitions for Review of the Decisions of the
Tax Court of the United States

BRIEF AND APPENDIX FOR THE COMMISSIONER

CHARLES K. RICE,
Assistant Attorney General.

FILED

LEE A. JACKSON,
HARRY BAUM,
CHARLES B. E. FREEMAN,
Attorneys,
Department of Justice,
Washington 25, D. C.

001 - 6 1959

PAUL P. O'BRIEN, CLERK

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for the Ninth Circuit**

No. 16,415

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v.

HALINA LUSTIG, RESPONDENT

**On Petitions for Review of the Decisions of the
Tax Court of the United States**

BRIEF AND APPENDIX FOR THE COMMISSIONER

OPINION BELOW

The findings of fact and opinion of the Tax Court (Appendix, *infra*) are reported at 30 T.C. 926.

JURISDICTION

The petitions for review involve federal income tax for the year 1954. The Commissioner determined a deficiency in the income tax of Halina Lustig and mailed a notice of deficiency to her in the amount of

\$186.58. (F.F. Appendix, *infra.*)¹ Within ninety days after the notice of deficiency was mailed and on January 9, 1957, Halina Lustig filed a petition with the Tax Court for a redetermination of that deficiency under the provisions of Section 6213 of the Internal Revenue Code of 1954. (Docket Entries, Appendix, *infra.*) The Commissioner determined a deficiency in the income tax of Paul Lustig and mailed a notice of deficiency to him in the amount of \$115. (F.F., Appendix, *infra.*) Within ninety days after the notice of deficiency was mailed and on July 31, 1956, Paul Lustig filed a petition with the Tax Court for a redetermination of that deficiency under the provisions of Section 6213 of the Internal Revenue Code of 1954. The decisions of the Tax Court were entered on October 17, 1958. (Docket Entries, Appendix, *infra.*) The cases were brought to this Court by a petition for review filed by Paul Lustig on January 15, 1959, and by a protective petition for review in the wife's case filed by the Commissioner on December 31, 1958. (Docket Entries, Appendix, *infra.*) Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

QUESTION PRESENTED

Whether the record supports the Tax Court's finding that Halina Lustig, rather than Paul Lustig, contributed more than one-half of the support for their minor son, with the result that Halina was entitled to the dependency exemption under Sections 151 and 152, Internal Revenue Code of 1954.

¹ For the purpose of brevity, the Tax Court's findings of fact will be referred to as "F.F.".

STATUTES INVOLVED

Internal Revenue Code of 1954:

SEC. 151. ALLOWANCE OF DEDUCTIONS FOR PERSONAL EXEMPTIONS.

(a) *Allowance of Deductions.*—In the case of an individual, the exemptions provided by this section shall be allowed as deductions in computing taxable income.

* * * *

(e) *Additional Exemption for Dependents.*—

(1) *In General.*— An exemption of \$600 for each dependent (as defined in section 152)—

(A) whose gross income for the calendar year in which the taxable year of the taxpayer begins is less than \$600,
* * *

* * * *

(26 U.S.C., 1958 ed., Sec. 151.)

SEC. 152. DEPENDENT DEFINED.

(a) *General Definition.*—For purposes of this subtitle, the term “dependent” means any of the following individuals over half of whose support, for the calendar year in which the taxable year of the taxpayer begins, was received from the taxpayer (or is treated under subsection (c) as received from the taxpayer):

(1) A son or daughter of the taxpayer, or a descendant of either,

* * * *

(26 U.S.C., 1958 ed., Sec. 152.)

STATEMENT

The facts as found by the Tax Court in these consolidated cases may be stated as follows:

The taxpayers, Halina and Paul Lustig, were husband and wife who were separated in 1954, the tax year involved, and later divorced. They filed separate income tax returns for 1954. Both claimed their minor son William as a dependent on their tax returns. Halina also claimed a deduction of \$600 for child care expenses. (F.F., Appendix, *infra*.)

Halina expended not less than \$950 for the support of her minor son William during 1954. This was more than one-half of his support. (F.F., Appendix, *infra*.)

Halina paid not less than \$775 for child care during 1954 for the purpose of enabling herself to be gainfully employed. (F.F., Appendix, *infra*.)

The Commissioner disallowed the claimed exemption for William to both taxpayers and also disallowed the claimed deduction for child care to Halina. The Tax Court determined that Halina contributed more than one-half for the support of William and that she was entitled to the dependency exemption for William and to the deduction for child care expenses. (F.F., Appendix, *infra*.)

Because the husband Paul Lustig has appealed, and because only one of the taxpayers may be allowed the dependency exemption, the Commissioner has appealed in the wife's case in order to protect the revenue in the event that this Court should reverse the Tax Court's decision in Paul Lustig's case.

STATEMENT OF POINTS TO BE URGED

1. The dependency exemption may be allowed to the taxpayer involved who contributed more than one-half of the support for the dependent; thus only one of the taxpayers, either Halina or Paul, may be allowed the dependency exemption.

2. In determining which of the taxpayers contributed more than one-half of the support for the dependent child, the Tax Court correctly took into account the amount Halina Lustig expended in caring for the child to enable her to be gainfully employed.

3. The record fully supports the Tax Court's finding that Halina expended not less than \$950 for the support of the dependent, which was more than one-half of the support.

4. If this Court should reverse the Tax Court's decision in Paul's case, then the Tax Court's decision in Halina's case should also be reversed.

ARGUMENT

I

The Record Fully Supports the Tax Court's Finding That Halina Lustig, Rather Than Paul Lustig, Contributed More Than One-Half of the Support for Their Minor Son, With the Result That Halina Was Entitled to the Dependency Exemption Under Sections 151 and 152 of the Internal Revenue Code of 1954

Sections 151 and 152 of the Internal Revenue Code of 1954, *supra*, allow a dependency exemption to the taxpayer who contributes more than one-half of the support for a minor son whose gross income is less

than \$600. The only question here is the factual one of which of these taxpayers contributed the requisite amount and, hence, was entitled to the exemption. The Tax Court found that Halina expended not less than \$950 for the support of the dependent son, and that this was more than one-half of the son's support.

The amount expended by Halina for the son's support, according to Halina's testimony, was \$939.57. (Tr. 40, Appendix, *infra*.) This amount included the cost of such items as clothing, milk, vitamins, medical care and medicines, food and dry cleaning. (Tr. 35, 37-39, Appendix, *infra*.) There is no question that the cost of such items are properly includible in determining the amount expended for support. *Jordan v. Commissioner*, decided August 12, 1958 (1958 P.H. T.C. Memorandum Decisions, par. 58,152); *Atchison v. Commissioner*, decided July 17, 1958 (1958 P.H. T.C. Memorandum Decisions, par. 58,140). The record further shows that Halina spent \$776.20 for the care of the son while she was gainfully employed to earn money for his support. (Tr. 41, Appendix, *infra*.) The amount spent for child care was included by the Tax Court in determining whether Halina spent more than one-half for the son's support. The child care expenditure was properly taken into account because as the Tax Court aptly observed in *Lovett v. Commissioner*, 18 T.C. 477, 478:

Any reasonable amount paid others for actually caring for children as an aid to the parent is a part of the cost of their support.

The allowance of a deduction not exceeding \$600 for child care expenses, by Section 214 of the Internal

Revenue Code of 1954, does not require excluding such expenses when determining the amount expended for support. The child care expenses deduction was intended as a deduction in addition to the dependency exemption, for the purpose of enabling a taxpayer (here the wife) to be gainfully employed. See H. Rep. No. 1337, 83d Cong, 2d Sess., pp. 30, A60 (3 U.S.C. Cong. & Adm. News (1954) 4055, 4197); S. Rep. No. 1622, 83d Cong., 2d Sess., pp. 35, 220 (U.S.C. Cong. & Adm. News (1954) 4666, 4856). The record, therefore, fully supports the Tax Court's finding that Halina spent not less than \$950, which was more than one-half of the son's support, and this factual finding should not be disturbed since Paul has not shown it to be clearly erroneous.

The Tax Court found that at most Paul expended \$619.² Assuming that the \$619 amount is entirely correct, Paul has not contributed more than one-half of the son's support on any theory. Even if the amount (\$400) claimed by Paul to have been paid to Halina is subtracted from the expenditures of Halina totalling \$939.57, the balance is \$539.57; adding to that balance the \$776.20 spent by Halina for child care makes a total of \$1,315.77 expended by Halina solely from her funds for the son's support. Thus Paul's contribution for the son's support, assuming the accuracy of the amounts claimed by him, is less than Halina's.

² This amount consisted of \$400 allegedly paid by Paul to Halina for the son's support (Tr. 20), estimated expenditures of \$215.50 (Tr. 24, 28-29) and substantiated expenditures of \$3.50 (Tr. 28-29).

II

**If the Tax Court's Decision Is Reversed In Paul's Case,
It Must Also Be Reversed In Halina's Case**

Since Halina contributed more than one-half of the son's support, the Tax Court correctly held that she, rather than Paul, was entitled to the dependency exemption.

Nonetheless, the Commissioner has appealed in Halina's case for protective reasons, because only one of the taxpayers involved may be allowed the dependency exemption. Hence, if this Court should reverse the Tax Court's decision in Paul's case, the decision in Halina's case must also be reversed.

CONCLUSION

The Tax Court's decisions are correct and should be affirmed. However, should this Court reverse the decision in Paul's case, the decision in Halina's case must also be reversed.

Respectfully submitted,

CHARLES K. RICE,
Assistant Attorney General.

LEE A. JACKSON,
HARRY BAUM,
CHARLES B. E. FREEMAN,
Attorneys,
Department of Justice,
Washington 25, D. C.

APPENDIX

Docket No. 65477

HALINA LUSTIG, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

APPEARANCES

For Petitioner:

For Respondent:

DOCKET ENTRIES

1957

- Jan 9—Petition received and filed. Taxpayer notified. Fee paid.
- Jan 10—Copy of petition served on General Counsel.
- Feb 15—Answer filed by Resp. Served 2/26/57.
- Feb 15—Request for Circuit hearing in San Francisco filed by Resp. 2/25/57 Granted.
- Oct 22—Notice of Trial, January 20, 1958, at San Francisco, Calif.
- Dec 4—Motion by Petr. for leave to file amendment to pet.; amendment to pet. lodged. 12/18/57 Granted.
- Dec 5—Notice of hearing Dec. 18, 1957, Washington, D. C., on petitioner's motion. Served 12/5/57.
- Dec 18—Motion of Dec. 4, 1957, is Granted. Served 12/19/57.

1958

- Jan 8—Answer to amendment to petition by Resp. Served 1/9/58.
- Jan 21—Trial had before Judge Tietjens on merits and Resp. motion to consolidate with

1958

63603. Granted—Served. Briefs due 3/7/58; Replies due 4/7/58.
- Feb 10—Transcript of Hearing 1/21/58 filed.
- Mar 6—Brief for Paul Lustig, Petitioner in Dkt. 63603, filed. Served 3/14/58.
- Mar 7—Motion by Resp. for extension of time to March 14, 1958, to file brief. Granted 3/11/58. Served 3/12/58.
- Mar 13—Brief for Respondent filed. Served 3/14/58.
- Mar 31—Motion by Paul Lustig, Petr. in Dkt. 63603, for extension of time to file substitute brief for the brief filed 3/13/58. Denied 4/1/58. Served 4/2/58.
- Mar 31—Reply Brief for Paul Lustig, Petr. in Dkt. 63603, filed. Served 4/16/58.
- Apr 4—Motion by Paul Lustig, Petr. in Dkt. 63603, to amend reply brief. 4/7/58 Granted.
- July 15—Findings of Fact and Opinion filed. Judge Tietjens. Dec. will be entered under R. 50. Served 7/15/58.
- Aug 13—Motion by Petr. to vacate or reconsider opinion filed 7/15/58. Denied 8/25/58. (Paul Lustig, petr. in Dkt. 63603).
- Aug 25—Order and Memorandum Sur Order filed. Judge Tietjens.
- Sept 17—Agreed comp. filed.
- Oct 17—Decision entered, Judge Tietjens.
- Dec 31—Petition for review by U.S.C.A. 9th Circuit, filed by G. C.

1959

- Feb 6—Motion for extension of time to file record on rev. and docket pet. for rev. to Mar. 31, 1959, filed by petr. on rev.

1959

- Feb 6—Order extending time to file record on rev. docket pet. for rev. to Mar. 31, 1959. Served 2/9/59.
- Feb 12—Designation of record on rev., with proof of service thereon, filed.
- Mar 12—Proof of service of petition for review filed.

[Caption Omitted]

PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in her notice of deficiency Ap:SF:AA:LT:90-D-WHLY, dated November 27, 1956, and as a basis for her proceeding alleges as follows:

- 1) The petitioner is an individual with residence at 390 - 17th Avenue, San Francisco, California. The return for the period here involved was filed with the District Director of Internal Revenue at San Francisco, California.
- 2) The notice of deficiency, a copy of which is attached and marked Exhibit A, was mailed to the petitioner on November 27, 1956.
- 3) The taxes in controversy are income taxes for the calendar year 1954, and in the amount of \$186.56.
- 4) The determination of the tax set forth in the said notice of deficiency is based upon the following error: the disallowance of a dependency exemption for her son, William Burton Lustig.
- 5) The facts upon which the petitioner relies as the basis for this proceeding are as follows:

a) William Burton Lustig was dependent upon the petitioner for support for the calendar year 1954.

b) The petitioner contributed over half the total amount expended for the support of the dependent named above.

Wherefore the petitioner prays that this Court may hear the proceeding and allow the petitioner an exemption for the dependent named in the petition and to determine that there is no deficiency in the amount of taxes payable by the petitioner for the year ended December 31, 1954.

Halina Lustig
Petitioner
390 - 17th Avenue
San Francisco
California

Exhibit A

Form 1230 (App.)

[SEAL]

In replying refer to

Ap:SF:AA:LT

90-D:WHLy

U. S. TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
Regional Commissioner

Appellate Division—San Francisco Region
Room 1010—870 Market Street
San Francisco 2, California

Mrs. Halina Lustig
390 - 17th Avenue
San Francisco, California

Dear Mrs. Lustig:

You are advised that the determination of your income tax liability for the taxable year(s) ended December 31, 1954 discloses a deficiency or deficiencies of \$186.58 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, WASHINGTON 4, D. C., for a redetermination of the deficiency. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday, or legal holiday in the District of Columbia in which event that day is not counted as the 90th

day. Otherwise Saturdays, Sundays, and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Assistant Regional Commissioner, Appellate, Rm. 1010, 870 Market St., San Francisco 2, California. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is the earlier.

Very truly yours,

RUSSELL C. HARRINGTON
Commissioner

By
Special Assistant
Appellate Division

Enclosures:

Statement
IRS Pub. 160
Agreement Form

STATEMENT

Mrs. Halina Lustig
390 - 17th Avenue
San Francisco, California

Tax Liability for the Taxable Year Ended December 31, 1954

<u>Year</u>		<u>Deficiency</u>
1954	Income Tax	\$ 186.58

In your return you claim a deduction for an exemption of \$600.00 on the basis of the support of your son, William B. Lustig. This deduction is disallowed because you have not shown that the amount contributed by you during the year 1954 constituted more than half of the support of the child.

In making this determination of your income tax liability, careful consideration has been given to your protest dated September 26, 1956 and to the statements made at the conference held on October 25, 1956.

Year: 1954

ADJUSTMENTS TO INCOME

Net income as disclosed by return		\$ 2,317.11
Unallowable deductions and additional income:		
(a) Child care	\$ 600.00	
(b) Taxes	22.89	622.89
	<hr/>	<hr/>
Adjusted gross income as corrected		\$ 2,940.00

EXPLANATION OF ADJUSTMENTS

(a) The deduction of \$600.00, representing child care, has been disallowed inasmuch as the dependent

for whom the expense was incurred has been disallowed.

(b) Inasmuch as the remaining allowable deduction of \$22.89 is less than the standard deduction, itemized deductions have been disallowed, and your tax liability has been determined from the Tax Table.

COMPUTATION OF INCOME TAX

Adjusted gross income	\$ 2,940.00
Income tax liability from Tax Table (One exemption)	\$ 410.00
Income tax reported on return Original Account No. OR 1843 list 55 First California District	223.42
	223.42
Deficiency in income tax	\$ 186.58

[Caption Omitted]

ANSWER

THE RESPONDENT, in answer to the petition filed in the above-entitled proceeding, admits and denies as follows:

1), 2), and 3). Admits the allegations in paragraphs 1), 2), and 3).

4). Denies that the Commissioner erred in the determination of the deficiency as alleged in paragraph 4).

5), a) and b). Denies the allegations of subparagraphs a) and b) of paragraph 5.

6). Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified or denied.

WHEREFORE, it is prayed that the Commissioner's determination in all respects be approved and the petitioner's appeal denied.

(signed) Herman T. Reiling
 HERMAN T. REILING M. L. S.
 Acting Chief Counsel
 Internal Revenue Service

OF COUNSEL:

Melvin L. Sears, Regional Counsel
 T. M. Mather, Assistant Regional Counsel
 Nat F. Richardson, Attorney
 Internal Revenue Service
 1069 Flood Building
 San Francisco 2, California

NFR:sp—2/ 2/5/57

[Caption Omitted]

AMENDMENT OF PETITION

In addition to issues raised in original petition it is requested that the TAX COURT OF THE UNITED STATES also give consideration to the allowance of \$600.00 of claim deducted for child-care as shown in original petition. The petitioner did contribute the chief support of the child claimed as a dependent and included therein is the amount of \$600.00 expended by the petitioner for child-care.

In addition it is requested that the Court also give consideration for allowance of deduction of State Income Tax in the amount of \$6.71 and for Social Security Tax for baby-sitters in the amount of \$16.18, a total of \$22.89.

Wherefore the petitioner prays that this Court may hear the proceeding and allow the petitioner an exemption for the dependent named in the original petition and also allow petitioner the deductions named in this amendment of petition.

Halina Lustig
Petitioner
390 - 17th Ave
San Francisco
California

[SEAL]

[Caption Omitted]

FINDINGS OF FACT

Petitioners who were husband and wife were separated from each other in February 1954, and later divorced. They filed separate income tax returns for 1954 with the district director of internal revenue at San Francisco, California.

Both claimed their minor son William as a dependent on their tax returns. Halina also claimed a deduction of \$600 for child care pursuant to section 214, I. R. C. 1954.

Halina expended not less than \$950 for the support of her minor son William during 1954. This was more than one-half of his support.

Halina paid not less than \$775 for child care during 1954 for the purpose of enabling Halina to be gainfully employed.

The Commissioner disallowed the claimed exemption for William to both petitioners and also disallowed the claimed deduction for child care to Halina. The ground for this action was that neither petitioner had shown that he or she had contributed more than half of the support of the child.

[Caption Omitted]

OPINION

The questions are in the main questions of fact and are disposed of by our findings.

At most Paul paid some \$619 for the son's support in 1954. We have found as a fact that Halina paid at least \$950 for the child's support with the result that she is entitled to claim him as a dependent. The amount paid by Halina includes the amount ex-

pending for child care. Paul contends that amounts paid for child care are not properly includible in determining whether or not a taxpayer has contributed more than one-half of the support of a claimed dependent. We have held otherwise. *Thomas Lovett*, 18 T. C. 477. There we said, "Any reasonable amount paid others for actually caring for children as an aid to the parent is a part of the cost of their support."

That case was decided under the Internal Revenue Code of 1939. However, we find nothing in the Internal Revenue Code of 1954 which would require us to depart from its holding. Section 214 of the 1954 Code allows "as a deduction expenses paid during the taxable year by a taxpayer * * * for the care of one or more dependents * * * but only if such care is for the purpose of enabling the taxpayer to be gainfully employed." The deduction may not exceed \$600 for any taxable year. No such deduction was provided for in the 1939 Code and Paul argues, in a manner not entirely clear to us, that this change in the law now makes it improper to include the cost of child care in determining dependency. We cannot follow this reasoning. Section 214 lays down no new rules for determining who furnished over half the support of a claimed dependent. In this respect we think the *Lovett* case is still the law and point out in passing that the Commissioner does not here contend otherwise.

Having held that Halina is entitled to the dependency exemption and having found that she paid not less than \$775 for child care in 1954 for the purpose of enabling her to be gainfully employed, it follows that she is entitled to a deduction of \$600 under section 214, *supra*.

Decisions will be entered under Rule 50.

[Caption Omitted]

DECISION

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion, filed July 15, 1958, the parties having filed on September 17, 1958, an agreed computation of tax, now therefore, it is

ORDERED and DECIDED: That there is no deficiency in income tax for the taxable year 1954.

ENTER:

Judge

[Caption Omitted]

PETITION FOR REVIEW

The Commissioner of Internal Revenue hereby petitions the United States Court of Appeals for the Ninth Circuit to review the decision entered by the Tax Court on October 17, 1958, pursuant to its findings of fact and opinion filed July 15, 1958 (30 T.C. #94), ordering and deciding that there is no deficiency in income tax for the year 1954.

This petition for review is filed pursuant to the provisions of Sections 7482 and 7483, and other applicable sections of the Internal Revenue Code of 1954, and in order to protect the revenue in the event that the taxpayer in the companion case of *Paul Lustig v. Commissioner*, Docket No. 63603, appeals to this Court.

JURISDICTION

Respondent on Review, Halina Lustig, is an individual with residence at San Francisco, California, and filed her federal income tax return for the year

1954, the year involved herein, with the District Director of Internal Revenue at San Francisco, California, which collection office is within the jurisdiction of the United States Court of Appeals for the Ninth Circuit, wherein this review is sought.

NATURE OF CONTROVERSY

Taxpayer, Halina Lustig and her husband, Paul Lustig were separated from each other in February, 1954, and were later divorced. They filed separate income tax returns for 1954 in which each claimed a deduction of \$600 as an exemption for their minor son, William. In order to protect the revenue the Commissioner disallowed the deduction in both cases. The Tax Court found that taxpayer, Halina Lustig, provided more than one-half of the son's support during 1954, and accordingly held that she is entitled to the deduction.

This appeal is filed merely to protect the revenue in the event that if Paul Lustig appeals the decision in Docket No. 63603 and this Court should reverse the Tax Court decision in that case, the instant case will also be before the Court for its determination.

(Signed) Charles K. Rice
 CHARLES K. RICE
 Assistant Attorney General

(Signed) Arch M. Cantrall
 ARCH M. CANTRALL
 Chief Counsel
 Internal Revenue Service

Counsel for Petitioner on Review

OF COUNSEL:

Charles P. Dugan
 Attorney
 Internal Revenue Service

[Caption Omitted]

DESIGNATION OF RECORD ON REVIEW

TO THE CLERK OF THE TAX COURT OF THE UNITED STATES:

In accordance with Rule 29 of the United States Court of Appeals for the Ninth Circuit, please prepare, transmit and deliver to the Clerk of the United States Court of Appeals for the Ninth Circuit, originals of the following documents in the above-entitled case in connection with the petition for review heretofore filed by the Commissioner of Internal Revenue, petitioner herein:

1. Docket entries
2. Pleadings:
 - a. Petition
 - b. Answer
 - c. Amendment to the Petition
 - d. Answer to amendment to petition
3. Motion for consolidation of proceedings in the Tax Court
4. Transcript of the oral testimony at the trial
5. All exhibits
6. The findings of fact and opinion of the Tax Court
7. Decision
8. Petition for review and notice of filing thereof
9. This designation of record on review.

(Signed) Charles K. Rice
CHARLES K. RICE
Assistant Attorney General

(Signed) Arch M. Cantrall
ARCH M. CANTRALL
Chief Counsel
Internal Revenue Service
Counsel for Respondent

STATEMENT OF SERVICE:

I certify that a copy of this designation of record on review was mailed to Halina Lustig, Respondent on Review, this twelfth day of February, 1959,

(Signed) Charles P. Dugan
 CHARLES P. DUGAN
 Attorney
 Internal Revenue Service

[Caption Omitted]

Testimony of Halina Lustig:

[Tr. 31]

THE CLERK: Will you so specify your name for the record?

THE WITNESS: My name is Halina Lustig.

THE COURT: Your address, please?

THE WITNESS: 390 - 17th Avenue.

THE CLERK: Thank you.

MR. RICHARDSON: If your Honor please, would it be a proper suggestion if I examined Mrs. Lustig?

THE COURT: It might be very helpful, if she has no objection to it.

THE WITNESS: No objection, your Honor.

THE COURT: All right.

The Clerk was wondering how to characterize this witness on the minutes. I would take it that she is appearing for herself?

MR. RICHARDSON: She is a Petitioner.

THE COURT: That is right. She is a Petitioner.

DIRECT EXAMINATION

By Mr. Richardson:

Q Mrs. Lustig, during the year 1954 where did you live?

[Tr. 32]

A At 1730 Broderick.

Q Did you live there that entire year?

A Yes, I did.

Q Mrs. Lustig, do you have records of the expenses, particularly with reference to your child, that you have made during that year?

A I have a receipt for the rent from the real estate company, Umbsen, Kerner & Stevens.

Q How much is that?

A The total for the year was \$581.25.

Q Now, you have receipts for that?

A For this I have a receipt.

Q Do you have it with you?

A Yes, sir.

Q Let me see it, please.

Mrs. Lustig, do you have any objection to this being made an exhibit?

A No, sir.

MR. RICHARDSON: I will show it to Mr. Lustig.

MR. LUSTIG: Your Honor, there is a difference of \$6, a difference of which we will waive, certainly.

MR. RICHARDSON: I don't know what his objection is, if your Honor please. I wish to offer this as an exhibit. It was identified by Mrs. Lustig.

THE COURT: It will be admitted.

[Tr. 33]

THE CLERK: Petitioner's Exhibit No. 2.

THE COURT: Petitioner Mrs. Lustig. There are two Petitioners.

THE CLERK: I don't want to have two sets of numbers, though, your Honor.

MR. RICHARDSON: Under consolidation of cases, would that—

THE CLERK: That would be correct, would it not, your Honor?

THE COURT: All right. It doesn't make any difference.

Admitted.

(Petitioner Halina Lustig Exhibit No. 2 was marked for identification and received in evidence.)

By Mr. Richardson:

Q Now, Mrs. Lustig, do you have any records as to your bill with the PG&E, the Pacific Gas & Electric Co.?

A Yes, sir.

Q What do you have there? Does this cover the year 1954?

A Yes, it does.

Q And this runs from January 12 through December 8, does it not, in that year?

A Yes, it does.

MR. RICHARDSON: Do you want to look at this, [Tr. 34] Mr. Lustig?

MR. LUSTIG: It's all right. What is the amount of that?

MR. RICHARDSON: If your Honor please, I offer this as an exhibit.

THE COURT: Admitted.

THE CLERK: Petitioner's Exhibit No. 3.

(Petitioner Halina Lustig Exhibit No. 3 was marked for identification and received in evidence.)

By Mr. Richardson:

Q Mrs. Lustig, let me get back to the rent again. Just a minute. Your receipt was \$581.25. As far as the child is concerned, did you attempt to prorate that rent as to what portion of it would be—

A Yes, I did.

Q And what figure did you arrive at on that?

A \$215.62.

Q Now, how did you arrive at that figure, if you know, Mrs. Lustig?

A During the first quarter of the year I lived in the apartment alone with the child. The rent at that time was \$43.75. I made a total for the quarter and deducted half of the total in the amount of \$65.62 for the dependent child. The remaining three-quarters when the apartment was also shared by my mother and when the rent had gone up to \$50, [Tr. 35] I totalled it and arrived at the amount of four fifty and deducted a third, the amount of one fifty, for the child.

Q And that gave you a total that you allocated to the child of \$215.63; is that correct?

A That is correct.

Q Now, Mrs. Lustig—

MR. LUSTIG: Excuse me. What was the total amount?

MR. RICHARDSON: \$215.63.

THE WITNESS: 62 cents.

MR. LUSTIG: What year?

MR. RICHARDSON: For the year 1954, allocable to the child.

By Mr. Richardson:

Q Now, Mrs. Lustig, do you have any idea as to the amount that you expended for the clothes for the child during that year, 1954?

A I have no receipts. I tried to go back to the year and remember it. The child grew rapidly during this time. I had to spend a lot for his clothes, for small items like you need for a child which has to be trained. And I estimated the total amount at \$100.

Q At \$100 for the entire year?

A For the entire year.

Q And that's your best estimate of what you spent for clothes for the child during that year?

[Tr. 36]

A That is correct.

Q Mrs. Lustig, you had some item of Dy-Dee Wash, I think it is called?

A For the first two months of the year 1954 we had diaper service, which is called Dy-Dee Wash. I have found two check stubs. I totalled them up, and the amount of \$14.35. After those two months the service was discontinued.

Q Do you have those check stubs?

A No, sir. I have only my check stubs.

Q I mean that's what I was asking you for. Do you have the stubs?

A It will take me a moment to find them.

MR. RICHARDSON: If your Honor please, it just occurred to me that rather than go through this list and make exhibits of each of these, may I ask Mr. Lustig if he will agree to these?

THE COURT: Certainly.

MR. RICHARDSON: Mr. Lustig, I can show you the list of what Mrs. Lustig has. I would like to ask if you would agree to it.

MR. LUSTIG: Certainly.

MR. RICHARDSON: You would?

MR. LUSTIG: I will have a look at it first.

THE COURT: Let's take a 10-minute recess.

(Short recess.)

[Tr. 37]

MR. RICHARDSON: If your Honor please, during the recess I have showed Mr. Lustig a list of expenses that Mrs. Lustig claims, and he has agreed to several of them.

If I may just state, Mr. Lustig, I understand there is an item for Kaiser Foundation in the amount of \$39.

MR. LUSTIG: There is a question mark there. I would like to know if that was all just the child.

MR. RICHARDSON: You have an opportunity, of course, to examine Mrs. Lustig. I mean I want to know now which items you agree to.

MR. LUSTIG: The ones I really did agree to was the PG&E, \$8, and the Borden's milk bill.

MR. RICHARDSON: In the amount of \$47.56?

MR. LUSTIG: No, no. She includes milk.

MR. RICHARDSON: Tell me which ones you will agree to.

MR. LUSTIG: I agree to the PG&E; I agree to the dry cleaning.

MR. RICHARDSON: That dry cleaning is in the amount of \$12?

MR. LUSTIG: That's right. And the vitamins, \$12, and an estimated amount of \$5.

MR. RICHARDSON: Will you agree to those items?

MR. LUSTIG: I agree. They are too small to argue.

By Mr. Richardson:

[Tr. 38]

Q Mrs. Lustig, did you have medical expenses to the Kaiser Foundation in 1954?

A Yes. I had two different kinds. There was quarterly dues for which I have a receipt in the amount of \$39.60 for the year for the child only.

MR. RICHARDSON: Do you want to look at this?

MR. LUSTIG: I agree to this \$39.60.

MR. RICHARDSON: I offer this—if he agrees to it it isn't necessary.

THE COURT: You agree to it?

MR. LUSTIG: I agree to it.

MR. RICHARDSON: I don't see any point in including it with the exhibits.

THE COURT: No.

By Mr. Richardson:

Q Did you have other medical expenses?

A I had other medical expenses for which I couldn't get a receipt. Office visits were charged at \$1 and home visits at \$2. I estimated there was a minimum of ten office and ten home visits, which make it a total of \$20.

Q Now, do you recall if, during the year 1954, those office visits and home visits actually took place?

A Yes; at least that many.

Q Now, did you have an expense for milk, Borden's milk, during that year?

[Tr. 39]

A Yes, I did.

Q How much was that?

A \$47.56.

Q And did that include milk for yourself also?

A Yes, it does. I don't drink much milk.

Q Do you have any way of saying how much went to the child and how much to you?

A Well, except that I don't drink milk as such, but I might take a little in my coffee twice a day.

Q The child drank milk at that time?

A Of course.

Q Now, there is an item of food, Mrs. Lustig. What did you estimate that you paid for the child's food in 1954?

A The child had at that time a diet of one egg a day, two slices of bacon a day, one banana, one orange; in addition to this, two or three baby cans of fruit and vegetable, one baby can of meat and

cookies and such foods from the general household that were suitable for babies.

Q How much would you estimate it cost you per day for the child's food?

A A dollar a day.

Q One dollar a day during the year 1954?

A Yes.

Q Now, did you have any expenses for launderette and soap?

[Tr. 40]

A A great deal.

Q Do you have any idea of what that is?

A I estimated a very minimum of \$1 a month.

Q For the year 1954?

A For the year '54.

Q That would be \$12 for that year?

A Yes, sir.

Q Now, did you have any expense for the barber shop; tips?

A Yes, I did. The child went every four weeks and I paid \$1.50 for the barber and the barber got a quarter tip.

Q Mrs. Lustig, do you have a total there of the expenses that you have enumerated?

A Yes, I do.

Q What is that total?

A Excuse me just a moment.

Q I am speaking of the ones he has agreed to.

A I have a total of \$939.57.

Q And is it your testimony that that amount was expended by you during the year 1954 for the benefit of the child?

A This is the amount exclusive of child care, and this is my testimony; yes.

Q Now, as to child care, Mrs. Lustig, can you tell the Court what the child care consisted of and how much you spent [Tr. 41] in 1954?

A I employed two different girls. In the first quarter I paid \$140.50; the second quarter \$234; the third quarter \$182.20; the fourth quarter \$220.50. That is the total amount of wages of \$776.20 for which I paid social security, and I have the cancelled checks made out to—

Q Just a minute. What is the amount of the social security that you paid for the baby sitters?

A I didn't total it up. The first quarter it was \$7.62; the second quarter \$8.68; the third quarter \$7.25; the fourth quarter \$8.82.

* * * *

[Tr. 44]

By Mr. Richardson:

Q Now, Mrs. Lustig, one more thing. The amounts that you paid for baby sitters, as I understand it, your total is \$776.20 in 1954?

A Yes, sir.

Q Were the baby sitters necessary so that you could work?

A That is right.

Q And without the baby sitters could you have held a job and supported yourself?

A I could not.

Q The total amount for baby sitters, I believe you testified, was \$776.20?

[Tr. 45]

Q Was there food for the baby sitters, Mrs. Lustig?

A No. I did not include that in here. I included only the social security.

Q What was the food for the baby sitters, Mrs. Lustig, if you know?

A \$6 a day.

Q Were there any other expenses that you had in connection with the baby sitters?

A I had baby sitters for extra days, weeks, and evenings, where I went out; but not in order to enable me to hold a job. Is that what you mean?

Q Any expenses that you had in connection with the baby sitters in connection with your working or holding a job.

A No. I had the baby sitters. It was two per cent social security and an estimated food expense for sitters in the amount of \$60 a year.

MR. RICHARDSON: I think that's all.

THE COURT: Mr. Lustig, do you want to cross-examine?

MR. LUSTIG: Yes, your Honor.

Pardon me, please, Mr. Richardson. May I ask you for the item marked expense, which I did not have?

CROSS-EXAMINATION

By Mr. Lustig:

[Tr. 46]

Q Mrs. Lustig, you stated here that Dy-Dee Wash you paid during the year '54 at two months, two check stubs which have \$14.35?

A That is right.

Q Since you paid them in '54 is it possible that one of those checks was for December 1953 that you paid in '54?

A That could be; that could be, but I—

MR. LUSTIG: It will just take about—if it is agreeable with Mr. Richardson, \$7 we could take off; a difference of \$7.20.

THE COURT: Let Mrs. Lustig check.

A It was paid on the 18th of January, and the

amount was \$7.35. I think about half of it should be deducted then.

By Mr. Lustig:

Q I believe you have made two payments. The second payment was in February for the month of January, and the \$7.35 would all be the December bill?

A No. It went from the middle of the month to the middle of the month.

Q Do you have any bill from Dy-Dee to that effect?

A I am sorry, your Honor. It takes me some time to find it now.

MR. LUSTIG: Will your position—would it be agreeable we take \$7.35 for December?

MR. RICHARDSON: No, sir. I will take whatever [Tr. 47] she says. I don't want to pick a figure out of thin air.

MR. LUSTIG: In other words, the \$14.35, I will go along with you on this case. We will take about \$3.50 for December '53 and the rest for '54.

THE COURT: Let's let Mrs. Lustig testify Mr. Lustig. You don't know what it is. You are surmising.

MR. LUSTIG: Sorry.

THE WITNESS: I added my expenses which I paid during the year 1954, and also there must have been in 1955 some expenses for the last month in 1954 which entered into it; so that I don't see that there is an error occurring.

By Mr. Lustig:

Q You say you discontinued Dy-Dee Service in February of '54?

A That's true. But I paid it in January.

Q In other words, for February; is that it? Well, anyhow I just want to bring out the point. I don't think \$7 is worthwhile arguing about, or \$3, or whatever it would amount to.

Mrs. Lustig, is it correct that up to June, I believe it was, of '55 I did have visiting rights at your residence for the child about three times a week?

A That is correct.

Q And in other words, that up to June '55, during the year of 1954, I saw the child about two or three times a week?

[Tr. 48]

A That is correct.

Q And that I very often gave the child his bath and put him to bed?

MR. RICHARDSON: If your Honor please, I submit this is irrelevant.

MR. LUSTIG: I will connect it, your Honor; I will connect it.

* * * *

[Tr. 56]

By Mr. Lustig:

Q You say you have your laundry soap, \$12 a year. Do you have any receipt for that?

A Launderette and soap.

Q Launderette and soap estimated \$12 a year. That's a lot of soap, \$12 a year.

A I didn't keep my stub every time I bought a box of soap flakes.

THE COURT: Does that mean that that \$12 was all for soap? I didn't so understand it.

THE WITNESS: Well, I don't have a washing-machine, your Honor. It means I take my linen to the laundromat, where I pay 65 cents a week for the washing.

THE COURE: So it is not all for soap?

THE WITNESS: In addition to that, when I was at home I used soap.

By Mr. Lustig:

Q In other words, the point I want to make is the launderette was just for the child's clothes?

A This is what I—

Q Or your own, too?

A I am estimating this as what I used for the child.

[Tr. 57]

Q Now, the barber shop, \$21 a year. Do you recall that on several occasions I took the child myself to the barber?

A No, I don't recall that.

Q If I would bring the barber in and say that I had the child there, would you believe that the barber is lying?

A In '54 I don't believe you did.

Q If I did, would you say the barber is wrong? Is that it? He didn't see the child in his place?

THE COURT: You don't have to answer that question.

MR. LUSTIG: All right. It is just a few dollars involved, which I will include in my pleadings—in my argument.

By Mr. Lustig:

Q The vitamins is all right. Now, there is one thing which we have, the food expense. Do you recall that during 1954, at that time when you told me that you needed the money to take the child to go on a vacation and take the child along, that you said to me that the food costs—excuse me—that the food costs about \$10 a month?

A I cannot recall that.

[Tr. 59]

By Mr. Lustig:

Q You stated before that the food the child ate was about one can of meat a day and about two or three cans of vegetables or fruit?

A In the beginning of the year, that is right. And later he ate steak, chicken.

Q Whatever you ate you shared with him; is that right?

A Well, I would say that I went out of my way to feed the child, which was not well, and I ate what I bought for him.

Q And you don't think that in view of your statement to me, which you say you do not recall, but you do not deny, that you spent only \$10 a month on food for the child; that you are up to \$30 a month?

Let's put it another way. Is it correct I had the child with me during three weekends in '54?

A I believe that is right.

Q That is correct. That I had the child with me on so many weekend days and, as I stated before, about 40 weekend days?

A Yes; except that you only gave the child usually one meal, which was lunch.

[Tr. 60]

Q That is correct; that is correct. I would have brought out the same point. In other words, I had him with me on three-day weekends and had 24 meals. I had him with me about 40 weekends and I have here—I have a computation of 43 meals for those 40 days, a total of 67 meals computed out of 22 days that I fed the child during the year. Will you say that it would be correct?

A That could be.

Q And during the year you were—you took the

child to visit the house of one Mrs. Epstein in San Rafael for—was it a week or two?

A Yes.

Q Two weeks?

A Two weeks.

Q Two weeks. Did you pay Mrs. Epstein for the food that the child consumed?

A Do I have to answer this, your Honor?

THE COURT: Yes. I think it is relevant.

A I did not pay it in cash. I took the child—

By Mr. Lustig:

Q Thank you. That's all I want to know.

A May I finish?

THE COURT: Let the witness finish.

A I took the child out. He woke up every morning at 6:00. We went to a restaurant and we had our breakfast there [Tr. 61] because the rest of the family did not wake up until 9:00. And later during the year when my financial circumstances were a little bit easier, I saw to it that my friend was suitably reimbursed for expenses, but not in cash, which would not have been acceptable to her.